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OCTOBER 7TH, 1902.

DIVISIONAL COURT.

CROW'S NEST PASS COAL CO. v. BELL.

Libel—Pleading—Defence—Fair Comment—Embarrassing Pleading—Particulars.

An appeal by plaintiffs from an order of BOYD, C., in Chambers, refusing an application by plaintiffs to strike out one of the defences in an action for libel.

G. G. S. Lindsey, K.C., for appellants.

A. E. Knox, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.:—This is an action for libel, the libellous matter complained of being an article referring to the appellants' operations, contained in a newspaper published or alleged to be published by the respondents.

One of the defences set up is that of fair comment.

The learned Chancellor, upon the application of the plaintiffs to strike out that defence, directed that the pleadings should be amended. The appellants are not satisfied, and have appealed from the order, contending that, even with the amendment which the learned Chancellor directed to be made, the defence is insufficient.

The article complained of contains a number of allegations of fact—statements of fact—and the paragraph of the statement of defence objected to does not attempt in any way either to give a statement of the facts upon which it is alleged the article was fair comment, or allege that the statements of fact in the article complained of were true.

We think the position of the appellants is right.

It is clear upon the authorities that a man may not invent his facts and comment upon them and succeed upon the ground that, the facts being assumed to be true, the comment is fair.

The matter has been the subject of discussion in a good many cases in this Province and Dominion and elsewhere.

In Penrhyn v. Licensed Victuallers' Mirror, 7 Times L. R. 1, the form of defence is given in which the defendant, who set up the defence of fair comment, where there were matters of fact alleged, stated that, so far as the article complained of contained statements of fact, those statements of fact were true, and as to the other matters that they were matters of fair comment; and that was held to be the proper form of pleading in such a case.

In Martin v. Manitoba Free Press Co., 21 S. C. R. 518, Brown v. Moyer, 20 A. R. 509, and Douglas v. Stephenson, a decision of this division, 29 O. R. 616, 18 Occ. N. 339, afterwards affirmed by the Court of Appeal, 26 A. R. 26, 19 Occ. N. 60, this view of the law is recognized and acted upon.

It seems to us, therefore, that the order of the learned Chancellor did not go far enough, and that the pleading must be struck out, unless the respondents elect to amend, by either setting out a statement of the facts with regard to which they allege the article was a fair comment, or, in the other form, by justifying the statements of fact contained in the article, and as to the other matters pleading that they were fair comment upon those matters of fact.

Two forms of pleading this defence are given in Odgers on Libel and Slander, 3rd ed., numbers 29 and 30, pp. 672 and 673.

The form of pleading number 29 is that which was recognized as the correct pleading by a Divisional Court composed of Justices Mathew and Grantham in Penrhyn v. Licensed Victuallers' Mirror. The third paragraph, which is the material one, is as follows: "In so far as the said words consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest."

The other form it is not necessary to refer to.

The respondents should have ten days in which to make their election and to amend.

The motion of the appellants also asked for particulars of the defence. We think it would be premature to determine anything as to that until the form of pleading is settled. It may be that the pleading may contain all the information that the respondents are required to give, and, therefore, we do not interfere with the order in that respect, but leave the appellants, if they are so advised, to make their application when the pleading is placed upon file.

The costs of the appeal will be to the appellants in any event.

FALCONBRIDGE, C.J. OCTOBER 14TH, 1902.

TRIAL.

WATTS v. SALE.

Chattel Mortgage—Seizure under—Breach of Trust—Damages.

Action for damages for taking possession of a laundry business in the city of Windsor under a chattel mortgage, which the plaintiffs alleged was a breach of trust.

W. R. Riddell, K.C., and J. W. Hanna, Windsor, for plaintiffs.

A. B. Aylesworth, K.C., and J. E. O'Connor, Windsor, for defendant.

FALCONBRIDGE, C.J.:—I find all the issues of fact in favour of defendant. I find that defendant in making the seizure acted in good faith with the object of protecting the trust property and himself as trustee-mortgagee, and he is entitled to be recouped his expenses and to be paid proper compensation for his care and trouble.

I acceded somewhat hastily to the proposition that plaintiffs' damages should, in the event of their succeeding, form the subject of a reference. But it was quite manifest on the general evidence that plaintiffs have suffered (if any) damages of the least substantial that can be imagined.

Action dismissed with costs, including all costs over which I have any disposing power. Reference to determine amount of defendant's compensation and disbursements.

Thirty days' stay.

OCTOBER 14TH, 1902.

DIVISIONAL COURT.

MURPHY v. BRODIE.

Stay of Proceedings—Consolidation of Actions—Parties.

An appeal by plaintiff from an order of BRITTON, J., in Chambers, ante 429, varying an order of one of the local Judges at Sandwich which dismissed an application by defendant to stay proceedings in this action, or to consolidate it with the action of Stuart v. Brodie, in which the same issues were said to be involved.

F. A. Anglin, K.C., for plaintiff.

F. E. Hodgins, K.C., for defendant.

THE COURT (BOYD, C., STREET, J., MEREDITH, J.) varied the order appealed against by directing that this action

be consolidated with Stuart v. Brodie, with leave to all parties to amend; all parties agreeing to take the consolidated action down to trial at the next sittings. Costs in the cause.

BRITTON, J. OCTOBER 15TH, 1902.

CHAMBERS.

CALDWELL v. BUCHANAN.

Libel—Pleading—Defence—Stating Facts and Circumstances—Embarrassment.

Appeal by defendant from order of local Judge at Perth striking out paragraph 3 of the statement of defence in an action for libel by a member of the congregation of St. Andrew's Presbyterian church in the village of Lanark against the minister of that church. The alleged libel stated that the plaintiff had accepted a deficient certificate of membership in irregular form. The 3rd paragraph of the defence stated at great length the facts and circumstances under which the defendant wrote the alleged libel, and concluded as follows: "The defendant's attention was called to the said article (an article in another newspaper) by members of his congregation, and it was urged that the false impression thereby conveyed should be corrected, and the defendant thereupon wrote and forwarded to such papers as had a circulation in the said counties what he believed to be a fair and impartial statement of the result of such proceedings, which said statement is the article or articles complained of."

J. H. Moss, for defendant.

Grayson Smith, for plaintiff.

BRITTON, J.:—I shall not interfere with the discretion which the local Judge exercised in striking out this paragraph and allowing defendant to amend as he may be advised. The application was made under Rule 298, not under Rule 261, and the only question is, whether this paragraph embarrasses plaintiff or is calculated to do so in the trial of the real issue between the parties. An embarrassing plea is one in which matter is pleaded that the defendant is not entitled to make use of. No doubt a good deal of liberty is allowed in case of libel, where defendant may set out all the facts relied on as shewing justification or privilege or in mitigation of damages, but it is not clear what paragraph 3 is intended to be. It may mean that the impression created by the certificate of membership which the plaintiff had obtained was a false impression, and that the defendant was justified in an attempt to correct that impression in the mind of the

public by publishing what is complained of. If that is the meaning, it is embarrassing. If that is not its meaning, the latter part of the paragraph is embarrassing in not being so framed as to shew clearly what defendant intends to rely upon. Appeal dismissed. Costs in cause to plaintiff.

OCTOBER 15TH, 1902.

DIVISIONAL COURT.

RE SCADDING.

Will—Legacy—Interest on — Legatee Attaining Majority — Death of Widow—Mixed Fund.

Appeal by executors from order of MACMAHON, J., in Chambers (ante 467), declaring that executors should pay out of the estate interest upon legacies from the dates of the legatees attaining majority.

The appeal was heard by BOYD, C., STREET, J., MEREDITH, J.

C. A. Masten, for executors.

W. Bell, Hamilton, for legatees.

BOYD, C.:—The scheme of the will is to create a trust fund of the whole estate, real and personal, to be held by the trustees and executors to pay first of all an annuity of $800, and then to pay all the balance of the income to the widow for life, and on her death to divide the corpus: to the two grandchildren $1,000 each, and then an equal division among the testator's children. The bequest of these two legacies is declared to be subject to the widow's life interest; the legacies are to be paid when the grandchildren attain 21, but in case the estate is divided (i.e., upon the death of the widow) before they attain 21, then interest is to be paid on the legacies; if the grandchildren die before attaining 21, the legacy falls into the estate. The meaning of this clause is, that the legacies are made contingent upon the beneficiaries coming of age, when they become vested, but the time of payment is postponed till the widow dies. They have attained 21, and the widow did not die till some years thereafter. The payment of interest on legacies depends upon certain rules which are modified by the intentions of the testator, as expressly or impliedly declared by the language of the will. This will is not silent as to interest; it contemplates and provides for the payment of interest on the legacies after the time fixed for dividing the estate, if the legatees are not then of age. That indicates that interest is not meant to be given before the time arrives for dividing the estate. It is a general rule

that interest is not payable on a legacy, whether vested or not, until it is actually due and payable. Interest is given for delay in payment. The testator here has in effect declared that these legacies are not to be paid until the death of the widow. If that falls after the beneficiaries attain 21, it does not follow that interest should be given in the interval; for the time has not arrived which the testator has fixed for payment, and there is no default. Interest is not to be exacted when by the direction of the testator there is nothing in hand to pay the legacy. Toomey v. Tracey, 4 O. R. 708, distinguished. Therefore, the appeal should be allowed and it should be declared that interest on the legacies runs only from the death of the widow. See Crickett v. Dolby, 3 Ves. 16. Order accordingly. Costs out of the estate.

STREET, J., concurred.

MEREDITH, J.:—The meaning of the will is, that, in the events which have happened, the legacies in question became payable at the widow's death, not upon the legatees respectively attaining full age.

The scheme of the testator, as developed in his will, was that the estate should remain intact until his wife's death, so that she might have the benefit of the whole income from it; and that at her death the legacies in question should go to these grandchildren, to be paid to them as they attained majority, and all were put upon an equality by the express provision that interest should be paid to those whose payments should be deferred by reason of their minority.

The fact that one of the legatees attained full age in the testator's lifetime goes to confirm this reading of the will.

WINCHESTER, MASTER. OCTOBER 17TH, 1902.

CHAMBERS.

HARRIS v. HARRIS.

Pleading—Statement of Claim—Statements of Unnecessary Facts and of Evidence—Embarrassment—Pleading to Claim—Waiver.

Motion by defendant Elizabeth Harris to strike out certain paragraphs of the statement of claim. The plaintiff, claiming to be the lawful widow of the late Hebron Harris, brought this action against Elizabeth Harris, who also claimed to be the widow of Hebron Harris, and the executors of his will, for a declaration that plaintiff was the lawful wife and is the lawful widow of the deceased. The paragraphs of the statement of claim objected to referred to a certain action in the High Court, in which the defendants the executors were plaintiffs and the two sons of the plaintiff were defendants, brought to

have probate of the will of Hebron Harris decreed, and stated the proceedings in that action, and that an appeal thereon was still pending in the Court of Appeal. The defendant Elizabeth Harris filed a statement of defence, and at the same time served notice of this motion.

D. L. McCarthy, for applicant.

H. M. Mowat, K.C., for plaintiff, contended that, by delivering a statement of defence, defendant waived the right to object to the statement of claim, and shewed that there was no embarrassment.

THE MASTER:—In my opinion, the defendant did not waive her right to object to the plaintiff's statement of claim, as she served her notice of motion with the statement of defence. The paragraphs complained of are improperly pleaded under Rule 268, as being statements of unnecessary facts and of evidence. Order made striking out paragraphs 6, 7, 8, and 10, with leave to plaintiff to amend. Costs to applicant in any event.

MACMAHON, J. OCTOBER 18TH, 1902.

TRIAL.

McGARRIGLE v. SIMPSON.

Will—Testamentary Capacity—Senile Dementia—Insane Delusions—Comprehension of Terms of Will—Attack on Will by Person having Accepted Benefit under it—Costs.

Action for a declaration that a certain instrument in writing executed by Cornelius McGarrigle, deceased, on the 1st December, 1899, was not his last will and testament, on the ground that he was not of testamentary capacity at that date. The testator was at this time more than seventy years of age. He could neither read nor write. He had partly lost his memory, and was considered by his employer, who was a physician, to be in an advanced stage of senile dementia. On the 1st December, 1888, he had made a will leaving all his property among his brothers and sisters. The will in question made almost the same disposition of his property, the only substantial difference being in the bequest to his brother John, which was under the first will $4,000 and under the last will $2,000. He was declared a lunatic on the 19th February, 1900, and died in an asylum on the 31st August, 1900.

C. H. Ritchie, K.C., and J. Baird, for plaintiff and defendants Moment and Davey.

A. J. Armstrong, Cobourg, for defendant Simpson.

H. F. Holland, Cobourg, for defendant McGee.

W. R. Riddell, K.C., for the other defendants.

MacMahon, J. (after reviewing the evidence) referred to the following cases: Waring v. Waring, 4 Moo. P. C. 351; Banks v. Goodfellow, L. R. 5 Q. B. 549; Jenkins v. Morris, 14 Ch. D. 674, 42 L. T. N. S. 817; Den v. Vancleve, 2 Southard (5 N. J.) 589; Stevens v. Vancleve, 4 Wash. (U. S. C. C.) 267; Greenwood v. Greenwood, 3 Curt. Appx. xxx.; Boughton v. Knight, 3 P. & D. 64; Smee v. Smee, 5 P. D. 84; Murfitt v. Smith, 12 P. D. 116; Roe v. Nix, [1893] P. 55, 9 Times L. R. 128: and concluded:—

McGarrigle, no doubt, had an imperfect memory; he could not recollect where the furnace was while at Dr. Hilliar's; he forgot that Dr. Hilliar had paid him the principal and interest due on the VanCamp mortgage; he could not remember that the amount of the mortgage had been deposited to his credit in the Standard Bank, and asked foolish questions about it; and he forgot the amount appearing to his credit in the bank pass book. On the 28th December, 1899, in conversation with Mr. Tole, he spoke about his loss suffered in the Skinner property, the fact being that he had sold it and received the purchase money; and, although he had made his will and divided his property, he spoke of his intention to do so if he had forgotten the making of the will. And on the following day, on going to the Dillings' house, he wanted to sleep on a shelf in the pantry, and shortly afterwards he spoke of the chickens as colts and sheep, and wanted them shod.

These and other circumstances shew that he was possessed of delusions on some subjects. But the making of the impeached will was an act of his own volition. He had for some time contemplated making a new will, and had spoken to Mr. Simpson (his solicitor and executor) on several occasions of his intention to make a will; and from what transpired in Mr. Simpson's office on the 1st December, 1899, McGarrigle came there having in his mind the making of a will, and having a full knowledge and recollection of the amount of the property he possessed, and having also in his mind the manner in which it should be divided, and who he intended should take as beneficiaries under the will.

From the evidence . . . no matter what latent delusions existed in the testator's mind, they had no influence on the disposal of his property, for it is almost the same disposition that was made under the will of 1888, when no delusions affected his mind. . . .

There will be judgment for defendants declaring that the testator was at the time of the making of the will of 1st December, 1899, of sound mind, memory, and understanding, and that the said will is his last will and testament.

In this case I should have followed the rule laid down in Davies v. Gregory, 3 P. & D. 28, Roe v. Nix, [1893] P. 57, Brown v. Penn, 12 Times L. R. 46, and Browning v. Mostyn, 13 Times L. R. 184, and granted the plaintiff his costs out of the estate, but for his acceptance of a payment of $1,500 under the will which he afterwards impeached, and his execution of a release under seal in which the terms of the will are recited. He is thereby estopped from contesting the validity of the will. He said, at the time he received the $1,500 on account of the bequest to him, that it was better to take the money than go to law.

The costs of all parties except the plaintiff will be paid out of the estate.

OCTOBER 18TH, 1902.

C. A.

LEEDER v. TORONTO BISCUIT CO.

Master and Servant—Injury to Servant in Factory—Elevator—Defects—Safeguards—Signals—Negligence—Findings of Jury.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of the jury in an action for damages for injuries sustained by plaintiff, while in the employment of defendants, by their alleged negligence. Plaintiff fell down an elevator shaft not provided with self-closing gates. There was no person in charge of the elevator. The workmen used it when necessary. The plaintiff had been using it, and, supposing it was still at hand, whereas it had been withdrawn by others, stepped into the shaft, and was injured. The jury found that the factory inspector was asked by defendants if the safeguards of the elevator were sufficient, and said they were; that the defect in the hoisting apparatus consisted in the want of a proper signal and of a self-acting guard; and that the accident was due to defendants' negligence.

W. R. Riddell, K.C., and R. H. Greer, for appellants, contended that, on the evidence, plaintiff was negligent in backing towards the shaft without looking, and that, on the finding of the jury as to the factory inspector, they were entitled to judgment.

F. Denton, K.C., and A. D. Crooks, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The jury found that there were two defects in the condition or arrangement of the hoisting apparatus . . . These defects are quite independent of each

other. If it were necessary to rest the case upon the last, much might be said for defendants' contention that they were not obliged to provide any safeguards to the elevator itself beyond that which the factory inspector had approved of as sufficient, after inspection and examination of it. When that safeguard was applied, it was of course sufficient, consisting as it did of doors or gates intended when closed to be fastened with a latch, and in that condition would necessarily prevent any one from falling into the elevator opening, or passing into the elevator until opened again for the purpose of being used. The doors did not shut automatically, and it was contended that some additional device should have been employed, such as automatic bars, which would have guarded the opening in case the doors were temporarily left open, either by neglect or because the elevator was to be immediately re-entered by the person who had just used it. It had not occurred to the inspector that any additional safeguard of this kind was required, and he thought that with ordinary care it was safe enough.

In the view we take of the case, it is not necessary to decide whether compliance with the directions of the inspector under the Factories Act is sufficient to absolve defendants from negligence which they might otherwise be open to have imputed to them under the provisions of the Workmen's Compensation Act, in respect to the absence or insufficiency of a guard, because the other ground on which the jury found against defendants arises out of the manner in which the elevator was used in the factory, which created a danger against which the safeguard approved by the inspector was not intended to, and did not, provide. . . . The only way in which notice would be given of the withdrawal or sending up of the elevator . . . was the rattling or shaking of the hoisting rope; no other signal or warning was provided for. The jury might well have come to the conclusion . . . that the arrangement of the whole apparatus was defective in the absence of some better provision for signalling its movements to those who had been using it and were immediately about to use it again. The findings of the jury absolve the plaintiff of negligence, and if he was not aware that the elevator had been hauled down, such a result cannot be said to be wrong. It cannot be ruled as a matter of law that plaintiff was negligent in not having shut the doors when he stepped out of the elevator or in not having looked behind him. . . .

Appeal dismissed with costs.